Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

BRANDON VALDIVIESO and DAVID KICKZALES, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ATLAS AIR, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Are wage-and-hour actions brought in state courts pursuant to the Fair Labor Standards Act, which provides that such actions"may be maintained in any court of competent jurisdiction," non-removable?

II. Does the legislative history of the Fair Labor Standards Act — which Congress amended to exempt transportation workers (seamen, railroad employees, over-the-road truck drivers and air-carrier employees) whose maximum hours were regulated by other federal laws — show an intention not to exempt from overtime protection those non-pilot air-carrier employees whose overtime is not otherwise regulated?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include only those who appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Brandon Valdivieso and David Kickzales, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Valdiviseo v. Atlas Air, Inc.*, 305 F.3d 1283 (11th Cir. 2002) and is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the district court concerning removal is reported at *Valdiviseo v. Atlas Air, Inc.*, 128 F. Supp. 2d 1371 (S.D. Fla. 2001) and is reproduced at 9a. The opinion of the district court granting defendant's motion for summary judgment was not reported; it is reproduced at 17a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on September 20, 2002. No rehearing was sought.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, (FLSA) 29 U.S.C. § 201, *et seq.*, are set forth below:

§ 213 Exemptions

(b) Maximum hour requirements. The provisions of section 7 shall not apply with respect to —

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act....

§ 216 Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. ***An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.*** No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this

subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which

> (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or
>
> (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(Emphasis supplied.)

The pertinent provision of the removal statute, 28 U.S.C. § 1441, is set forth below:

> § 1441 Actions Removable Generally
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this

chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

STATEMENT OF THE CASE

Brandon Valdivieso and David Kickzales worked for Atlas Air, Inc. as in-flight load masters (both) and a ramp supervisor (Valdivieso). Their jobs were to oversee the loading of cargo planes and (as load masters) to accompany cargo on flights for Atlas Air's clients, which generally were airlines to whom Atlas Air outsourced planes and crews. Both Valdivieso and Kickzales worked in excess of 40 hours a week without being paid overtime. They were not subject to any regulation by the Federal Aviation Administration.

Valdivieso and Kickzales filed suit pursuant to the overtime provisions of the FLSA, 29 U.S.C. § 207, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Atlas Air removed the case to the United States District Court for the Southern District of Florida. The district court, Hon. Adalberto Jordan, J., denied Valdivieso and Kickzales' motion to remand. The district court held that the 1948 amendment to the removal statute provided that federal-claim cases may be removed from state court "[e]xcept as otherwise expressly provided by Act of Congress..." 28 U.S.C. § 1441(a). That amendment, according the district court, trumps the language of 29 U.S.C. § 216(b) that provides that an action brought by an employee pursuant to the FLSA "may be maintained against any employer ... in any Federal or State court of competent jurisdiction."

The district court, Hon. Ted E. Bandstra, United States Magistrate Judge, held on December 21, 2002, that Valdivieso and Kickzales, even though their maximum

hours were regulated by no federal agency, were exempted from the overtime protections of the Act by the "air-carrier" exemption, 29 U.S.C. § 213(b)(3).

The Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's final decision.

A panel of the circuit court affirmed the denial of the motion to remand based upon another panel's decision in *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002), *petition for cert. filed, 71 U.S.L.W. 3169* (U.S. Sept. 3, 2002) (No. 02-337), which was handed down subsequent to Valdiviseo and Kickzales' initial brief. The panel also affirmed the grant of summary judgment concerning the scope of the air-carrier exemption.

REASONS FOR GRANTING THE WRIT.

I.

The United States Court of Appeals for the Eleventh Circuit has entered a decision that is in conflict with the decision of another United States Courts of Appeals on the issue of whether actions brought in state courts pursuant to the Fair Labor Standards Act are subject to removal.

The Court should grant the petition for a writ of certiorari to establish uniformity amongst the circuits on the issue of whether actions brought in state courts pursuant to the Fair Labor Standards Act of 1938 are removable. The conflict is whether the Act's provision that an action brought pursuant to it "may be maintained against any employer ... in any Federal or State court of

competent jurisdiction," 29 U.S.C. § 216(b), constitutes an express provision against removal, as envisioned by the 1948 amendment to the removal statute, 28 U.S.C. § 1441(a). The Court of Appeals for the Eighth Circuit, in a case decided one year prior to the removal statute's amendment, *Johnson v. Butler Bros., Inc.*, 162 F.2d 87 (8th Cir. 1947), held that such cases are not removable.[1] The Court of Appeals for the First Circuit held in *Cosme Nieves v. Deshler*, 786 F.2d 445, 451. (1st Cir.), *cert denied*, 479 U.S. 824 (1986), held that the 1948 amendment trumped *Johnson* The Court of Appeals for the Eleventh Circuit this year followed *Cosme Nieves* in

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[1]The *Johnson* court reasoned thus:

> "[T]o maintain an action or suit may mean to commence or institute it; the term imports the existence of a cause of action. * * * Maintain, however, is applied to actions already brought, but not yet reduced to judgment * * * . In this connection it means to continue or preserve (persevere) in or with; to carry on. * * *" BLACK'S LAW DICTIONARY, 3rd Ed., 1143. The usual dictionary definition of the word "maintain" is: "To keep up or carry on (as, to maintain an action or undertaking); persevere in; prosecute; also, to keep in existence or continuance * * * ."
>
> * * *
>
> [I]t is our opinion that Congress, in providing that an "action to recover such liability may be maintained in any court of competent jurisdiction * * * " and that "The court in such action shall, in addition to any judgment awarded to the plaintiff * * * , allow a reasonable attorney's fee * * * and costs * * * ," intended not only that the action might be commenced in any court of competent jurisdiction, but that it could be prosecuted to final judgment in the court in which it was commenced. If that was not the intention of Congress, the words "may be maintained in any court of competent jurisdiction" merely state a truism and are surplusage.

162 F.2d at 88-89.

Breuer v. Jim's Concrete of Brevard, Inc., 292 F.3d 1308 (11th Cir. 2002), which it in turn followed in the case at bar.

The depth and currency of the conflict

Although the source of the conflict is more than 50 years old — i.e., the 1948 amendment of the removal statute, 28 U.S.C. 1441(a), one year after the Court of Appeals for the Eighth Circuit decided in *Johnson* that actions brought in state court pursuant to the FLSA are not removable — its impact is as current as last month. That is when one district court in the Northern District of Texas followed *Breuer* and *Cosme Nieves* in denying a motion to remand a claim brought pursuant to the FLSA. *Collins v. Horizon Training Centers, L.P.*, Slip Copy No. CIV 3:02-CV-1310-L, 2002 U.S. Dist. LEXIS 19493, 2002 WL 31305105 (N.D. Tex. October 10, 2002). Another Northern District of Texas court, less than four months earlier, had followed *Johnson* in remanding to state court a similar complaint. *Castillo v. Texans Can!*, Slip Copy, No. CIV.A.3:02-CV-0587-R, 2002 U.S.Dist. LEXIS 13555, 2002 WL 1733727 (N.D. Tex. July 25, 2002).

Cases interpreting the differences in language of the two statutes stretch over several decades up to the moment. The *Breuer* court collected 30 cases between 1946 and 2002 holding actions brought pursuant to the FLSA to be removable, 292 F.3d at 1309, n. 1,[2] and 12 cases between 1948 and 2000 holding to the contrary. *Id.* at n. 2.[3] Cases offering the differing interpretations include not only wage-and-hour suits, but also actions

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[2]*See* App. D, at 29a.

[3]See App. E, at 32a.

brought in the relatively recent past pursuant to statutes adopting the FLSA's enforcement mechanism, i.e., the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*,[4] and the Equal Pay Act, 29 U.S.C. § 206(d),[5] and even the Family Medical Leave Act, 29 U.S.C. § 2601, *et seq.*,[6] which adopted its "may be maintained" language. *See* 29 U.S.C. § 2617(a)(2) ("Right of action").

The division, thus, clearly is wide and on-going, giving to the conflict between the 1948 Johnson case and the 1986 *Cosme Nieves* case a longer-lasting ripple effect than one might expect. These are waves that only this Court can calm through the grant of certiorari. As the Court of Appeals for the Eleventh Circuit stated in Breuer:

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[4]*Compare, e.g., Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 459-461 (5th Cir. 1982) (upholding removability of a claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, and specifically stating that it was not addressing claims brought under the FLSA), and *LeMay v. Budget Rent A Car Systems, Inc.*, 993 F.Supp. 1448, 1450, n. 3 (M.D. Fla. 1997), (denying remand of ADEA claim because "instead of 'maintained,' Congress could have chosen to use the word 'brought' which has a decidedly different meaning.".

[5]*Compare, e.g., Lisai v. Chevron Stations*, Slip Copy No. CIV 3:97-CV-1288-G, 1997 U.S. Dist. LEXIS 20841, 1997 WL 694705 (N.D. Tex. Nov. 4, 1997) (denying remand of claim brought pursuant to Equal Pay Act, 29 U.S.C. § 206(d)), and *Christine Maranto vs. Ken Jenne, in his official capacity as Sheriff of Broward County*, Slip Copy No. 00-7463-Civ-Dimitrouleas (S.D. Fla. Nov. 29, 2000) (remanding Equal Pay Act claim on authority of *Johnson*).

[6]*See Lloyd v. Classic Chevrolet, Inc.*, Slip Copy No. CIV 4:01-CV-896-Y, 2002 U.S. Dist. LEXIS 1604, 2002 WL 989470 (N.D. Tex. Jan. 31, 2002) (granting motion to remand claim brought pursuant to Family Medical Leave Act because of the *Johnson* interpretation of "may be maintained.").

> Because of the long-standing difference among the district courts and the apparent conflict between the Eighth Circuit in *Johnson v. Butler Bros.* and the First Circuit in *Cosme Nieves*, and now with this Circuit, it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard. Litigants should not be treated with such disparity in our federal system.

292 F.3d at 1310.

The importance of a speedy resolution

While the *Johnson/Cosme Nieves* conflict has been around since 1986, and has spawned dozens of conflicting district court rulings, *see* notes 2 & 3, *supra*, its resolution has been hampered because of the difficulty in obtaining appellate review of the issue. Except in select civil rights cases, a defendant whose case is remanded to state court has no federal appellate remedy. *See* 28 U.S.C. § 1447(d).[7] A remanded plaintiff, meanwhile, has no appellate remedy other than through the district court's issuance of a certificate of interlocutory appeal pursuant to 28 U.S.C. § 1292(b),[8] *see, e.g.*, *Breuer*, 292 F.3d at 1308,[9] or

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[7]That section provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

[8]That section provides as follows:

(continued...)

following an adverse decision on the merits. Thus, the universe of potential appellants concerning the removal and/or remand of a FLSA case is substantially narrowed. How else, then, would one explain the relative dearth of appellate-level case law over a span of 50-plus years on a subject that has engendered as many conflicting district court opinions?

Private plaintiffs brought, during the 12 month period ending March 31, 2002, 1,886 actions that either were initiated in or removed to United States district courts, up from 1,791 the year before.[10] For those cases that were removed, as opposed to being initiated in federal court, a denial of remand raises two undesirable alternatives: either, ***One***, continuing absence of

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[8](...continued)

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

[9]*Breuer* appears to be the only FLSA case, among all of those in which remand was denied over the past 50-plus years, in which a 1292(b) certification was granted.

[10]*See*, FEDERAL JUDICIAL CASELOAD STATISTICS, Table C-2, Cases Commenced, by Basis of Jurisdiction and Nature of Suit, March 31, 2001 and March 31, 2002.

jurisdiction, *see Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 76-77 (1996),[11] resulting in the possibility of wasted judicial labor, or, ***Two***, (assuming Congress intended that state court actions brought pursuant to the FLSA to be nonremovable) the nullification of Congressional intent. In addition, there is the difficult-to-quantify impact that the district courts' trend towards favoring removal, *compare* App. D and App. E, has on plaintiffs who view any attempt to bring an FLSA action in state court as being futile.

The majority rule in the district courts, which is now precedent in the First and Eleventh Circuits, chills what several district court have found to be important Congressional policy considerations in having made FLSA actions easier for working men and women to prosecute by having made those actions nonremovable. *See, e.g.*, *Haun v. Retail Credit Co.*, 420 F.Supp. 859, 862-863 (W.D. Pa. 1976)("in FLSA cases that the amount in controversy may be small and some plaintiffs in rural areas may be 'removed' out of a suit if they are forced to suffer the expense and inconvenience of maintaining their suit in a federal court many miles away"); *Carter v. Hill & Hill Truck Line, Inc.*, 259 F.Supp. 428, 430 (S.D. Tex. 1966)(setting out in an appendix the American Law Institute commentary noting that "[t]hese cases are typically for a very small sum and would invite the use of removal as a harassing tactic"); *Wilkins v. Renault*

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[11]The *Caterpillar, Inc.* court stated:

> [D]espite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated. *See*, Fed. Rule Civ. Proc. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.")

Southwest, Inc., 227 F.Supp. 647, 648 (N.D. Tex. 1964)(Congress recognized in enacting the 1948 and 1958 amendments to the removal statute that "removal was an obvious tactic by which the defendant could delay, increase the costs of litigation and harass the plaintiff").

Effectuation of those policy reasons, especially considering the ongoing tension between the lower courts and the difficulty in obtaining appellate review,[12] militates for this Court's intervention through the issuance of a writ of certitoari.

Congressional intent was to disallow removal

The legislative history of the FLSA — which curiously has never been addressed in any of the decisions concerning removal — shows that Congress intended for wage-and-hour actions brought in state courts to stay there. Congress replaced a provision in the initial version of the bill that called for ***concurrent*** jurisdiction with state and territorial courts,[13] with language providing that

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[12]The only appellate treatment of the issue over the past 50-plus years has been in *Valdiviseo, Breuer, Baldwin* (ADEA), *Cosme-Nieves* and *Johnson*.

[13]Section 22(b) of Senate Bill 2475, as it passed the Senate July 22, 1937, stated that

> The district courts of the United States shall have jurisdiction of violations of this act or the regulations or orders thereunder, and, ***concurrently*** with State and Territorial Courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this act or the regulations or orders thereunder...

(Emphasis added.) As introduced May 24, 1937, both S. 2475 and its House

(continued...)

"an action to recover such liability may be maintained in any court of competent jurisdiction..." *See, e.g.*, CONF. REP., § 16 (b), 83 CONG. REC. 9249 (1938). As one of the House conference committee managers explained immediately before the final vote: "[I]f there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them..." 83 CONG. REC. 9264 (1938) (remarks of Rep. Keller) (emphasis added).

The conference committee's changing of the language is particularly compelling considering that prior to the enactment of the FLSA, as noted in *Maloy v. Friedman*, 80 F.Supp. 290 (N.D. Ohio 1948), "[t]he Supreme Court of the United States [had] twice held in construing the word 'maintained' in a Federal statute that 'to maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun.'" 80 F.Supp. at 292, citing *Smallwood v. Gallardo*, 275 U.S. 56 (1927) and *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373 (1933).

In summary, certiorari is necessitated by, ***One***, the divergence of the two lines of appellate authority, *Valdivieso/ Breuer/Cosme-Nieves* on the one hand, and *Johnson* on the other, concerning whether actions brought pursuant to the FLSA are removable; ***Two***, the repeated and on-going controversy in the lower courts which has eluded appellate review in all but three circuits for more than 50 years; and, ***Three***, the failure by any of

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[13](...continued)
companion, H.R. 7200, contained the concurrent-jurisdiction provision at § 26.

the numerous courts addressing the issue to consider the legislative history.

II.

The United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law concerning an exemption to the Fair Labor Standards Act, one which should be, but has not been, decided by this Court, i.e.: does the "air-carrier" exemption remove maximum-hour protection from all air-carrier employees, regardless of whether any federal agency polices their overtime.

The Court should grant the Petition for a Writ of Certiorari to clarify whether Congress intended, in enacting the air-carrier exemption to the FLSA, to create an air-carrier workplace free of ***any*** federal overtime regulation for the more than two-thirds of the industry's employees who are neither pilots, co-pilots nor flight engineers. This impacts more than 250,000 air-carrier employees.[14]

The legislative history shows clearly that Congress did not so intend. Such a totally unregulated air-carrier

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[14]The Department of Labor's Bureau of Labor Statistics identifies in its 2000 National Occupational Employment and Wage Estimates the following numbers of persons as having been employed in the following Standard Occupational Classifications: Aircraft Mechanics and Service Technicians, SOC 49-3011, 135,730; Flight Attendants, SOC 39-6031, 126,380; Avionics Technicians, SOC 49-2091, 15,360; Aircraft Cargo Handling Supervisors, SOC 53-1011, 9,960. By contrast, the BLS identified 94,820 persons as Airline Pilots, Co-Pilots and Flight Engineers, SOC 53-2011, and 18,040 as Commercial Pilots, SOC 53-2012.

workplace, however, is precisely what the Eleventh Circuit's holding sanctions.

While several circuits, as well as some district courts, have addressed the air-carrier exemption in terms of non-pilot employees,[15] none have reviewed its legislative history. That legislative history displays an intent not to have an air-carrier industry that was ***un***regulated, but merely one that was not ***over***-regulated. The air-carrier exemption was amended onto the Act on the Senate floor merely to ensure that the maximum hours of air-carrier employees, just like those of over-the-road truck drivers, not be regulated by two different agencies.[16] *See* Remarks of Sen. Black, 81 CONG. REC.

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[15]*See, e.g., Northwest Airlines, Inc. v. Jackson*, 185 F.2d 74, 77 (8th Cir. 1950) (employees involved in the modification of military aircraft were not exempted because they were not "engaged in the defendant's transportation activities"); *Roland v. United Airlines, Inc.*, 75 F.Supp. 25 (N.D. Ill. 1947) (modification-center case in which court adopted the logic of *United States v. American Trucking Association, Inc.*, 310 U.S. 534 (1940), which rejected a literal interpretation of § 204(a) of the Motor Carrier Act to deny overtime to all trucking-company employees); *Verrett v. The Sabre Group, Inc.*, 70 F.Supp.2d 1277 (N.D. Okla. 1999) (applying exemption to computer-reservation employees); *cf. Pan American World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America*, 324 F.2d 217 (9th Cir. 1963) (caricaturing a hypothetical shoe factory owned by an airline to illustrate that the Railway Labor Act, upon which the air-carrier exemption is based, is not so all-inclusive as to deny employees at nuclear research development facility the right to organize under the National Labor Relations Act).

[16]Section 13 of the Air Mail Act of 1934 required "the rate of compensation and the working conditions and relations for all pilots, mechanics, and laborers employed by the holder of [any air-mail] contract shall conform to decisions of the National Labor Board...." Section 401(k)(1) of the Civil Aeronautics Act of 1938, meanwhile, required "[e]very air carrier [to] maintain rates of compensation, maximum hours,

(continued...)

7875 (1937). Thus, § 13(a)(4) of the Fair Labor Standards Act of 1938, CONF. REP., §§ 13(a)(4), 83 CONG. REC. 9249, provided that the maximum-hour provisions of the Act would not apply to "any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act."[17] Similarly exempted were seamen, § 13(a)(3), and a large number of railroad and motor-carrier employees.[18] *See* § 13(b); *see also* 29 C.F.R. 783.29(a) ("Adoption of the exemption in the original 1938 Act").[19] As Sen. Black

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[16](...continued)
and other working conditions and relations of all of its pilots and co-pilots who are engaged in interstate air transportation...so as to conform with decision numbered 83 of the national labor Board on May 10, 1934...," Those provisions continue in effect today, including the limitation to pilots and co-pilots of the Federal Aviation Administration's jurisdiction to control maximum hours and compensation. *See* 49 U.S.C. § 42112(a)-(c). Indeed, the only federal regulation of maximum hours in the airline industry appear to be directed at pilots, co-pilots, navigators and flight engineers. *See* 14 C.F.R., Ch. I, Subch. G., Part 121, Subpart R.

[17]That exemption currently is codified at 29 U.S.C. § 213(b)(3).

[18]These exemptions currently are codified at 29 U.S.C. §§ 213(b)(6), (1) and (2), respectively.

[19]The Department of Labor's explanation of the exemptions is as follows:

> [T]he original bill considered by the congressional committees contained no exemption for seamen or other transportation workers. At the joint hearings before the Senate and House Committees on Labor, representatives of the principal labor organizations representing seamen and other transportation workers testified orally and by writing that the peculiar needs of their industry and the fact that they were already under special governmental regulation made it unwise to bring them within the scope of the proposed legislation (*see Joint Hearings before Senate Committee on Education and Labor and House Committee*
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> (continued...)

explained concerning the amendment to exempt over-the-road truck drivers and air-carrier employees:

> [I]t was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such a way as not to conflict with such regulation. That action was taken with reference to maritime workers. It was taken with reference to railroad workers insofar as they were governed by the Hours of Service Act.... So far as the pending amendment is concerned, and so far as the amendment to be submitted by the Senator from New York [Mr. Copeland] with reference to certain employees in the aviation service who are now under the Railroad Labor Act, it is my own belief that both of the amendments should be adopted.

81 CONG. REC. 7875 (1937).[20]

In the context of such legislative history, the "plain language" analysis used by the circuit court fails: courts

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[19](...continued)
on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 545, 546, 547, 549, 1216, 1217). The committees evidently acquiesced in this view and amendments were accepted (81 CONG. REC. 7875) and subsequently adopted in the law, exempting employees employed as seamen (sec. 13(a)(3)), certain employees of motor carriers (sec. 13(b)(1)), railroad employees (sec. 13(b)(2)), and employees of carriers by air (sec. 13(a)(4), now sec. 13(b)(3)).

[20] When the bill went to the House, the Committee on Labor moved the exclusion of these workers into the exemption portion of the bill rather than leave them in the definition section, lest excluding any workers from the definition of "employees" could complicate enforcement of the bill's child-labor provisions. H.R., Rep. No. 2182, at 13 (1938).

must look at what the words used meant when Congress originally used them, not what they might mean now. *See, e.g. St. Francis College v. Al-Khazraji*, 481 US 604, 613 (1987) (tracing meaning of the word "race" and using the contemporary, 19th Century understanding of that word to examine the legislative history of the Civil Rights Act of 1870, 42 U.S.C. § 1981); *United States v. American Trucking Association, Inc.*, 310 U.S. 534, 541-544 (1940) (rejecting literal interpretation of exemption for trucking-company employees and stating that courts reviewing such legislation cannot look at words as stand-alone strays, but rather must comprehend the context in which the legislature used them).

Under the court of appeal's interpretation of the air-carrier exemption, Atlas Air's load-master and ramp-supervisor employees are not protected concerning maximum hours by ***any*** federal agency, regulation or law. That is at odds both with Congress' intent and with this Court's teachings about the expansive, remedial purpose of the FLSA. *See, e.g. A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.") Certiorari is necessary to correctly decide this important question of federal law.

CONCLUSION

Based on the authorities cited and the argument presented, petitioners request the Court to grant the petition for a writ of certiorari as to each question presented.

Additionally, because the Department of Labor does not appear to have taken a position on either of the issues raised in this petition, petitioners request the Court to invite the Solicitor General to explain the view of the United States.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED SEPTEMBER 20, 2002

United States Court of Appeals
Eleventh Circuit

No. 02-11185

BRANDON VALDIVIESO, DAVID KICKZALES, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ATLAS AIR, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida. D. C. Docket No. 00-07426-CV-AJ. Ted E. Bandstra, Judge.

Before BARKETT, WILSON and KRAVITCH, Circuit Judges.

PER CURIAM:

Plaintiffs-appellants Brandon Valdivieso and David Kickzales ("Appellants"), former employees of defendant-appellee Atlas Air, Inc. ("Atlas Air"), brought an action on behalf of themselves and all other similarly situated loadmasters employed by Atlas Air alleging they were

denied the premium overtime compensation required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*[1] The magistrate judge granted Atlas Air's motion for summary judgment on the ground that the air carrier exemption to the FLSA, 29 U.S.C. § 213(b)(3), does not require Atlas Air to pay Appellants overtime compensation.[2] Appellants appeal.

I. STANDARD OF REVIEW

"Because the question is purely one of law, this court reviews de novo the district court's denial of a motion to remand." *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1269 (11th Cir. 1998). "We review a summary judgment ruling de novo, applying the same legal standards used by the district court." *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1242 (11th Cir. 2001). In reviewing a motion for summary judgment, this court views the materials presented and all factual inferences in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). The non-moving party, however, "may not rest on mere allegations or denials of the adverse party's pleading" when a motion for summary judgment is made and supported by affidavits or the other methods provided in Rule 56; "specific facts showing there is a genuine issue for trial" must be supported "by affidavits or as otherwise provided in this

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[1]The Appellants initially filed suit in a Florida circuit court and Atlas Air removed the case to federal court. The district court denied the Appellants' motion to remand to state court. See *Valdivieso v. Atlas Air, Inc.*, 128 F. Supp. 2d 1371 (S.D. Fla. 2001).

[2]The parties consented to the jurisdiction of the magistrate judge for all proceedings in the case pursuant to *28 U.S.C. § 636*(c).

rule" and provided by the non-moving party to avoid summary judgment. Fed. R. Civ. P. 56(e).

I. BACKGROUND

Atlas Air is a commercial air carrier that owns, operates, and maintains a fleet of freighter aircraft that it uses to transport cargo. Specializing in long-term outsourcing of its aircraft under "Aircraft, Crew, Maintenance, and Insurance" ("ACMI") contracts, Atlas Air provides ACMI for flights it operates on behalf of its customers. The customers bear all other operating expenses, including fuel, landing fees, and cargo and ground handling. Atlas Air provides its services primarily to other major international airlines and does so indiscriminately.[3] Atlas Air solicits other entities that may

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[3]Atlas Air first filed an affidavit from Edmond Archer, director of Atlas Air's Miami facility, in support of its motion for summary judgment. In its reply brief, Atlas Air submitted an affidavit from Bruce Gillette, Atlas Air's vice president of products and services. On appeal, the Appellants claim that the magistrate judge erred by relying on the Gillette affidavit, which they assert is inconsistent with the Archer affidavit. Because the affidavits are not inconsistent, we reject this argument.

Atlas Air could have made this process less complex by presenting both affidavits with its initial motion for summary judgment instead of presenting the Gillette affidavit with its reply brief. The Appellants made a motion before the magistrate judge to strike the Gillette affidavit on the grounds that submitting it with a reply brief violated Local Rule 7.5 of the Southern District of Florida. The magistrate judge did not rule on this before issuing his order granting summary judgment and noted in his order that the facts were taken from the class action complaint and the Archer affidavit. However, in his conclusions of law, the magistrate judge relied on facts from the Gillette affidavit; for example, he states that Atlas Air "regularly accepts work from businesses that are not commercial airlines." The motion to strike the Gillette affidavit was denied by the magistrate judge's order closing the case. Appellants did not appeal this denial, and have not raised the alleged

(continued...)

need cargo transportation and accepts work from businesses that are not commercial airlines; there is no allegation that any member of the public that agrees to Atlas Air's terms and prices will not be served, subject to available resources. Customers contract with Atlas Air for dedicated aircraft(s); in the case of airlines, this allows them to expand their ability to meet cargo transportation responsibilities without investing in additional equipment and personnel.

The customers of Atlas Air are responsible for the ground transportation of the cargo shipped by Atlas Air, and they provide the agents who load and unload the cargo. Atlas Air oversees the cargo loading process to ensure that all cargo is secured within the aircraft for safe flight. Loadmasters-trained professionals who specialize in air cargo transportation - ensure that each cargo load complies with the size and weight parameters for the

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[3](...continued)
Local Rule 7.5 violation on appeal; therefore, we do not consider it.

In his affidavit, Archer states that "Atlas Air's customers are other major international airlines that focus principally on their passenger operations" and that "each Atlas flight is dedicated to transporting cargo for a single customer." The Gillette affidavit is clearly meant to be supplementary to the Archer affidavit. Gillette sought to clarify that "most of our work is performed for other commercial airlines because our services hold the greatest appeal for that segment of the public. However, we provide our services indiscriminately within that group, and we are available to transport cargo for entities that are not commercial airlines." He further stated that Atlas Air does not limit the customers for whom Atlas Air is willing to work, subject to the obvious constraints of available resources and the customer's agreement to Atlas Air's terms and prices. We note that in neither their motion to strike the Gillette affidavit nor their appellate brief do the Appellants contend, let alone provide support for the claim, that Atlas Air is not willing to provides its services to anyone willing to accept its business terms.

aircraft, that the distribution of the load's weight meets balance requirements, that any hazardous materials are transported in compliance with regulations, and that the load is properly secure. The essential services provided are the same whether the loadmaster travels with the cargo or is stationed on the ground at a particular airport.

Plaintiff Brandon Valdivieso performed loadmaster services for Atlas Air from March 1999 until April 2000.[4] At times he was responsible for and traveled with individual flights; at other times he provided loadmaster services exclusively on the ground in Miami, Florida. Plaintiff David Kickzales provided loadmaster services to Atlas Air from August 1998 to May 2000, and he generally traveled with the loads for which he was responsible. Neither plaintiff performed any services for Atlas Air that were not directly related to its air transportation activities.

III. DISCUSSION

Before us are two claims: that the district court erred by denying Appellants' motion to remand to state court, and that the magistrate judge erred by granting Atlas Air's motion for summary judgment as to the Appellant's FLSA overtime claim. Each will be considered in turn.

A. Motion to Remand

The Appellants claim that the district court's denial of their motion to remand to state court was error. According to the Appellants, claims brought under the

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[4]For purposes of the motion for summary judgment alone, Atlas Air conceded that Appellants are "employees" of Atlas Air and reserved the right to challenge this classification at a later stage if necessary.

FLSA in state court may not be removed to federal court. Any civil action brought in state court, in which jurisdiction would be proper in federal court, may be removed "except as otherwise expressly provided by Act of Congress." 28 U.S.C. § 1441. At the time Appellants filed their brief, whether or not § 216 of the FLSA provides an express prohibition on removal was an open question. Since the time the brief was filed, however, a panel of this court held that § 216 was not an express statutory prohibition against removal. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002). Therefore, the district court did not err by denying the motion to remand.

B. Air Carrier Exemption to the FLSA

The FLSA generally requires employers to pay premium overtime provisions to employees who work in excess of 40 hours per week. 29 U.S.C. § 207. There are specific exceptions, however, to the overtime requirements, including an exemption for "any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act." Id. § 213(b)(3). Those subject to the RLA include "every common carrier by air engaged in interstate or foreign commerce ..." 45 U.S.C. § 181.

The Supreme Court has ruled that "one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier." *Washington ex rel. Stimson Lumber Co. v. Kuykendall,* 275 U.S. 207, 211, 72 L. Ed. 241, 48 S. Ct. 41 (1927). "The dominant factor in fixing common carrier status at common law is the presence of a 'holding out' to transport the property or person of any member of the public who might choose to employ the proffered

service." *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*, 298 F.2d 430, 434 (9th Cir. 1962).

The plaintiffs argue that Atlas Air is merely an outsource lessor of aircraft and flight crews to airlines; the airlines that Atlas Air services are common carriers, but Atlas Air itself is not. Appellants' argument seems to assume that because the public at large does not utilize the services of Atlas Air, the company thereby loses common carrier status. This is an inaccurate view of the law. The Supreme Court has stated that "no carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts." *Terminal Taxi Cab Co. v. Kutz*, 241 U.S. 252, 254, 60 L. Ed. 984, 36 S. Ct. 583 (1916); *see also Las Vegas Hacienda*, 298 F.2d at 434 ("So long as the air carrier is competing commercially in the market for the patronage of the general public ... it is immaterial that the service offered will be attractive only to a limited group[.]"). Status as a common carrier is contingent on the carrier holding itself out to the public and offering its services indiscriminately to those interested in its services. *See Woolsey v. Nat'l Transp. Bd.*, 993 F.2d 516, 523 (5th Cir. 1993) (stating that "the crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or a definable *segment* of the public as being willing to transport for hire, indiscriminately" (emphasis in original)). Because Atlas Air offers its services indiscriminately to anyone willing to accept its terms and prices, we hold that it is a common carrier. We also note that Atlas Air is licensed by the U.S. Department of Transportation as a common carrier; furthermore, other courts have considered Atlas Air a common carrier under the RLA. *See Atlas Air, Inc. v. Air Line Pilots Ass'n*, 344 U.S. App. D.C. 1, 232 F.3d 218 (D.C. Cir. 2000); *Beckett v. Atlas Air, Inc.*, 968 F. Supp. 814 (E.D.N.Y. 1997).

The Appellants also claim that the air carrier exemption should not apply to their positions with Atlas Air because such a reading of the statute would leave these positions with no maximum hour protection under federal law. Based on the legislative history, the Appellants claim that the congressional intent of the exemption was to prevent the Department of Labor and the Civil Aeronautics Board from having overlapping jurisdiction. Courts cannot, however, consider legislative history when the statutory language is unambiguous. *See Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992) (Stating that the "cardinal canon" of statutory interpretation is that courts "must presume that a legislature says in a statute what it means and means in a statute what it says there. ... When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (citation omitted)). Here, the statutory language is certainly unambiguous. The RLA states that its provisions are extended to "every common carrier by air ... and every pilot or other person who performs any work as an employee or subordinate official of such carrier ...." 45 U.S.C. § 181. Appellants do not dispute that their positions as loadmasters are integral to the transportation of cargo; therefore, these positions are included in the air carrier exemption to the FLSA. *See Northwest Airlines, Inc. v. Jackson*, 185 F.2d 74, 75 (8th Cir. 1950).

IV. CONCLUSION

We AFFIRM the district court's denial of Appellant's motion to remand and the decision of the magistrate judge to grant Atlas Air's motion for summary judgment on the Appellant's FLSA overtime claim.

AFFIRMED.

APPENDIX B — ORDER DENYING MOTION TO REMAND, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JANUARY 18, 2001

United States District Court for the Southern District of Florida, Miami Division

No. 00-7426-Civ-Jordan

BRANDON VALDIVIESO and DAVID KICKZALES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ATLAS AIR, INC.,

Defendant

Adalberto Jordan, United States District Judge.

ORDER DENYING MOTION TO REMAND

Brandon Valdivieso and David Kickzales filed this case in Florida circuit court alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Atlas Air, Inc. timely removed the case pursuant to 28 U.S.C. § 1441, alleging that federal jurisdiction is proper under 28 U.S.C. § 1331. The plaintiffs have moved to remand the case to state court, arguing that the FLSA forbids the removal of cases to federal court. For the following reasons, the motion to remand [D.E. 8] is DENIED.

The plaintiffs argue that the language of the FLSA prohibits defendants from removing cases filed in state court. The FLSA provides that an action brought to enforce its provisions "may be maintained against any employer ... in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). The plaintiffs place great importance on the use of the word "maintained," and argue that because the statute uses the word "maintained," as opposed to "brought," FLSA suits filed in state court are not removable. Atlas argues that the FLSA, when read in conjunction with 28 U.S.C. § 1441, does not prohibit removal. In relevant part, § 1441 states that any civil action brought in state court, over which jurisdiction would be proper in federal court, can be removed "except as otherwise expressly provided by Act of Congress." Atlas contends that the FLSA is not an express prohibition within the meaning of § 1441.

The authority on this point is currently divided, and of the only two circuit courts to squarely consider the question, one prohibited removal and one allowed it. *Compare Johnson v. Butler Bros.*, 162 F.2d 87, 88-90 (8th Cir. 1947) (prohibiting removal) *with Cosme Nieves v. Deshler*, 786 F.2d 445, 450-51 (1st Cir. 1986) (allowing removal). *See also Emrich v. Touche-Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1988) (discussing removability generally, and stating that the FLSA is an example of a statute that allows cases to be brought in any court of competent jurisdiction and "contain[s] no limitation on removal, express or otherwise, to bar removal as required under § 1441(a)"); *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460-61(5th Cir. 1982) (holding that ADEA actions, which are enforced under the FLSA, are removable, but recognizing the split of authority on the removability of FLSA actions and reserving ruling on that question). In *Johnson*, which was decided over fifty years

ago, the Eighth Circuit held that Congress' use of the phrase "may be maintained in any court of competent jurisdiction" in § 216(b) indicated an intent to allow plaintiffs asserting FLSA claims to prosecute them to final judgment in whichever court they chose. 162 F.2d at 89. The *Johnson* panel concluded that cases under the FLSA were excepted from the effect of § 1441, which, at that time, did not contain the requirement that such statutory exception be express. *Id.* at 89-90. On the other hand, the First Circuit, in the only appellate opinion to address this issue after the 1948 amendment to § 1441, decided that cases brought under the FLSA in state court were removable to federal court. *See Cosme Nieves*, 786 F.2d at 451. The First Circuit reasoned that the FLSA "lacked an explicit statutory directive" which would prohibit removal, and that the phrase "may be maintained" was "ambiguous; at best [it is] suggestive." *Id.*

Unlike the circuit courts, district courts have not been so evenly split on whether to permit removal of FLSA cases that originate in state court. Some district courts have followed *Johnson*, holding that Congress' use of the word "maintained" is an express exception to the removal statute. *See, e.g., Lopez v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 865, 867 (S.D. Tex. 2000); *Esquivel v. St. Andrews Constr.*, 999 F. Supp. 863, 865 (N.D. Tex. 1998); *LeMay v. Budget Rent A Car Sys., Inc.*, 993 F. Supp. 1448, 1451 (M.D. Fla. 1997); *Pauly v. Eagle Point Software Co.*, 958 F. Supp. 437, 438-39 (N.D. Iowa 1997); *Courtwright v. Board of Regents*, 1991 U.S. Dist. LEXIS 17238, No. 91-0846- CV-W-3, 1991 WL 255594, at *1 (W.D. Mo. Nov. 22, 1991); *Wilkins v. Renault Southwest, Inc.*, 227 F. Supp. 647, 647 (N.D. Tex. 1964). Several of these courts have also based their holding on legislative history, citing to a 1958 Senate Report which they characterize as evidence of the congressional intent that

FLSA actions not be removed. *See Esquivel*, 999 F. Supp. at 865; *Wilkins*, 227 F. Supp. at 648. That Senate Report states:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the states. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the state court or the federal court. If filed in the state courts the law prohibits removal to the Federal court.

S. Rep. No. 85-1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3106. The courts relying on this excerpt have concluded that the report is clear evidence of congressional intent on the nonremovability of FLSA claims after the amendment of § 1441. *See Esquivel*, 999 F. Supp. at 865 ("The report is a direct statement that Congress clearly believed — even after it had amended § 1441 in 1948 — that 'the law prohibits removal (of FLSA actions) to the Federal court.'"); *Wilkins, 227 F. Supp. at 648* ("The Senate report leaves no room for doubt that the Congress, which creates and delineates the jurisdiction of federal district courts, thought that the *Johnson* case correctly stated the law.").

The developing majority view, however, is that FLSA actions are removable. *See, e.g., Bingham v. Newport News Shipbuilding & Drydock Co.*, 3 F. Supp. 2d 691, 692-94 (E.D. Va. 1998); *Chapman v. 8th Judicial Juvenile Probation Bd.*, 22 F. Supp. 2d 583, 584-86 (E.D. Tex. 1998); *H&R Block, Ltd. v. Housden*, 24 F. Supp. 2d

703, 705 (E.D. Tex. 1998); *Troutt v. Stavola Bros., Inc.*, 1994 U.S. Dist. LEXIS 19819, No. 4:94 CV00417, 1994 WL 773148, at *1-2 (M.D.N.C. Dec. 27, 1994); *Winebarger v. Logan Aluminum, Inc.*, 839 F. Supp. 17, 18 (W.D. Ky. 1993); *Loutfy v. R.R. Donnelley & Sons Co.*, 1992 U.S. Dist. LEXIS 6142, No. 92 C 01660, 1992 WL 97761, at *2 (N.D. Ill. May 4, 1992); *Nesbitt v. Bun Basket, Inc.*, 780 F. Supp. 1151, 1152 (W.D. Mich. 1991); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F. Supp. 989, 990 (E.D. Mo. 1991). These district courts have found that the FLSA's "may be maintained" language is not sufficiently explicit in light of Congress' amendment to § 1441. These courts have concluded, like *Cosme Nieves*, that the phrase "may be maintained" is ambiguous at best, and is consequently the very opposite of an express directive, as § 1441 now requires. *See, e.g., Bingham*, 3 F. Supp. 2d at 693 (noting that Congress failed to clearly and accurately express its intent that FLSA claims were nonremovable) (citations omitted); *Winebarger*, 839 F. Supp. at 18 (allowing removal, and noting that "plaintiff's interpretation asks too much of the word maintain"). A close consideration of these issues compels me to agree with this conclusion.

The words "may be maintained" are not, in common or legal parlance, an express exemption from the general scope of the removal statute. I agree with the First Circuit that "the words 'expressly provided' [in § 1441] must be construed to mean exactly that." *Cosme Nieves*, 786 F.2d at 451 (*citing Pueblo Int'l, Inc. v. DeCardona*, 725 F.2d 823, 827 (1st Cir. 1984)). For instance, Congress has "expressly provided" in 28 U.S.C. § 1445, captioned "Nonremovable cases," that cases arising under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, may not be removed to federal court. Additionally, Congress has proven itself capable of imposing limits, rather than absolute bars, on removal. *See* 28 U.S.C. § 1445(b)

(providing that cases arising under 49 U.S.C. § 11707 cannot be removed unless the amount in controversy exceeds $ 10,000).

Although the 1958 Senate Report appears instructive at first blush, I do not find the reasoning of those courts relying on it persuasive for a number of reasons. As an initial matter, the context of the Senate hearing was the amount in controversy for federal diversity jurisdiction, not a discussion of either the FLSA or § 1441. Moreover, Congress did not include the FLSA in 28 U.S.C. § 1445(c), which provides that actions brought under state workmen's compensation laws are not removable. Additionally, I agree with the observation of the district court in *Chapman* that "the act of referring to tangential legislative history merely underscores the fact that the statute at issue is not explicit on its face." 22 F. Supp. 2d at 586. And, as the Supreme Court has reminded us recently, the best evidence of a statute's meaning is the text itself. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 1932, 146 L. Ed. 2d 914 (2000) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993)).

The Eleventh Circuit has not yet weighed in on this debate. The plaintiffs, however, argue that the Eleventh Circuit has implicitly adopted the view that FLSA claims are not removable in its discussion of the removability of claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681. See Lockard v. Equifax, Inc., 163 F.3d 1259 (11th Cir. 1998). Lockard holds that FCRA actions are removable, and that the statute does no more than give state courts concurrent jurisdiction. *Id.* at 1264-65. In reaching that decision, *Lockard* discussed the split of authority surrounding removal in FLSA actions. *See id.* The

plaintiffs place particular emphasis on the Eleventh Circuit's observation that

> it is arguable that allowing a plaintiff to 'maintain' an FLSA suit in state court is logically inconsistent with allowing the defendant to remove the action to federal court, and that when Congress chose the word 'maintain,' it intended to create an exception to the removal statute. ... The FLSA wording is arguable.

Id. at 1264. Several points convince me that I need not grant the motion to remand based on this excerpt from *Lockard*. First, the Eleventh Circuit's discussion is dicta, and no firm conclusion, much less a holding, was reached about the removal of FLSA actions. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, J., concurring) (offering several rationales for the rule that "dicta in our opinions is not binding on anyone for any purpose"). Second, § 1441 requires an express provision to prohibit removal. The fact that the meaning of a statute is arguable is enough to cast aspersion on the contention that it is express. If the FLSA's phrasing were truly an express prohibition, there would likely be no split of authority, and the Eleventh Circuit could have pointed out that the language was clear. Third, I read *Lockard's* observation that the FLSA's language is arguably a prohibition on removal as intended merely to highlight the fact that the FCRA's text is not even arguable.

The plaintiffs also argue that two policy considerations support the nonremovability of FLSA claims. First, the plaintiffs argue that workers attempting to enforce wage and hour laws are better equipped to bring such claims in state court. Second, the plaintiffs argue that remanding such cases "unclogs" the federal

courts. Although both of these matters may implicate important policy considerations, they are reserved to Congress for resolution, and the language of § 216(b) simply cannot be stretched to meet the requirement in § 1441 that any exceptions to the general right of removal must be express. I simply do not believe that Congress is unable to be more express than the word "maintained," and I cannot disregard my interpretation of the statutory language in favor of policy considerations, regardless of how important or compelling the plaintiffs believe them to be. *See Cosme Nieves*, 786 F.2d at 451 (finding that the "express" requirement in § 1441 trumps the policy arguments both for and against removal)

In sum, I conclude that § 1441 and the FLSA, read together, permit the removal of FLSA actions. Although § 216(b) is certainly not a model of clarity, the rampant disagreement and ambiguity regarding its text make a convincing case that the FLSA was not intended to be an express exception to § 1441. Accordingly, the motion to remand [D.E. 8] is DENIED.

DONE and ORDERED in chambers in Miami, Florida, this 18th day of January, 2001.

APPENDIX C — ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, UNITED STATES DISTRICT COURT FOR THE SOUTHER DISTRICT OF FLORIDA, DATED DECEMBER 18, 2001

United States District Court
Southern District of Florida

No. 00-7426-Civ-Jordan/Bandstra

BRANDO VALDIVIESO and DAVID KICKZALES, on behalf of themselves and all other similarly situated,

Plaintiff,

v.

ATLAS AIR, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Defendant Atlas Air, Inc.'s Motion for Summary Judgment (D.E. 38) filed on June 5, 2001. On June 18, 2001, the parties consented to the jurisdiction of the undersigned United States Magistrate Judge for all proceedings in this case pursuant to 28 U.S.C. §636(c). Accordingly, the undersigned conducted a hearing on this motion on October 9, 2001. Having reviewed the pleadings, and in consideration of applicable law and oral argument of the parties, the Court hereby GRANTS Defendant's Motion

for Summary Judgment and dismisses this action for reasons stated below.

INTRODUCTION

This is an action for unpaid overtime compensation brought pursuant to the Fair Labor Standards Act of 1938, as amended [29 U.S.C. §201, *et seq.*] (hereinafter, the FLSA or the "Act"). Count I is brought by plaintiffs, Brandon Valdivieso and David Kickzales, pursuant to §16(b) of the Act, on behalf of themselves and all others similarly situated in-flight loadmasters employed by defendant Atlas Air, Inc. ("Atlas" or "Atlas Air"), who were not paid overtime to which they were entitled between 1997 and 2000. Count II is brought by Valdivieso on behalf of himself and all other ramp supervisors at Atlas who were also denied overtime to which they were entitled for hours worked over 40 hours per week.

Defendant Atlas Air has moved for summary judgment on both claims on the ground that the FLSA does not require Atlas Air to pay overtime compensation to plaintiff because of the "air carrier exemption" to the Act. Specifically, Atlas argues that under this exemption employees[1] such as plaintiffs who perform services related to the transportation activities of a common carrier such as Atlas Air are not entitled to overtime compensation.

Plaintiffs oppose summary judgment arguing, first, that Atlas Air is not a "common carrier" as envisioned by the FLSA; and, second, that they, as ramp supervisors and loadmasters, are not among the narrow class of employees

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[1]Atlas Air concedes, for purposes of this motion only, that plaintiffs are "employees" of Atlas Air, while reserving the right to challenge the classification, if necessary, at a later stage of this case.

to which the "air carrier exemption [sic]" was directed to apply.

STANDARD OF REVIEW

The court in reviewing a motion for summary judgment is guided by the standards set forth in Rule 56(c) of the Federal Rules of Civil Procedure which provides as follow

> ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ....

The moving party bears the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). Further, in addressing whether the moving party has satisfied this burden, the court is required to view the evidence and all factual inferences arising therefrom in the light most favorable to the non-moving party. *Clemons v. Doughtery County, FA.*, 684 F.2d 1365, 1368 (11th Cir. 1982), *citing*, *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608; *Augusta Iron & Steel Works v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). If the record presents issues of material fact, the court must deny the motion. *Adickes v. S. H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608. The non-moving party, however, cannot rest upon mere allegations, but must rebut any facts properly presented by the moving party through affidavits or other evidence demonstrating the existence of a genuine and material issue of fact for trial.

Id. at 398 U.S. 155, 90 S.Ct. at 1607. Moreover, summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986).

UNDISPUTED FACTS[2]

Atlas Air is a commercial air carrier that owns, operates and maintains a fleet of Boeing 747 freighter aircraft that it uses to transport cargo to over 100 cities worldwide. Atlas Air specializes in long-term outsourcing of its aircraft under contracts known in the industry as "ACMI" contracts. "ACM I" is an abbreviation for "Aircraft, Crew, Maintenance and Insurance." Atlas Air provides the ACMI for flights it operates on behalf of its customers, while its customers bear all other operating expenses, including fuel, landing fees, and cargo and ground handling expenses.

Atlas Air provides its outsourcing services to other major international airlines to facilitate their cargo needs. Each customer airline contracts with Atlas Air for one or more dedicated aircraft, allowing those airlines to expand their ability to meet their cargo transportation responsibilities without investing in additional equipment and personnel. Atlas Air is not a freight forwarder, which

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[2] This statement of undisputed facts is taken from the Class Action Complaint, and from the Affidavit of Edmond D. Archer, Director of Atlas Air's facilities at the Miami International Airport. Plaintiffs do not contest this statement of facts for purposes of this motion — and defendant Atlas Air accepts the allegations of the complaint stated above with the exception noted in footnote 1 above.

is a shipping company that collects shipments of goods for multiple customers, consolidates them, and then reships them in bulk.

Atlas Air operates its own aircraft. Atlas Air's customers are responsible for all ground transportation of the cargo shipped by Atlas Air, and they provide the handling agents who perform the physical work of loading and unloading the cargo on the aircraft. However, Atlas overseas the cargo loading process to ensure that all cargo is situated and secured within the aircraft's parameters for safe flight.

Loadmasters are trained professionals who specialize in air cargo transportation, and Atlas Air employs or contracts with them to coordinate and document all cargo-related functions on each of Atlas Air's flights. The safety of each flight depends on a number of the services provided by the loadmaster responsible for it. Specifically, the loadmaster ensures that each cargo load transported by Atlas Air complies with the size and weight parameters for the aircraft and flight. The loadmaster also ensures that the load's distribution on the aircraft meets the aircraft's balance requirements, and that any hazardous materials are packaged and transported in compliance with all applicable regulations. Finally, the loadmaster ensures that each load is properly secured to prevent it from shifting during flight.

Before each flight, the loadmaster prepares the flight's load plan. First, the loadmaster determines the appropriate distribution of the expected cargo on the aircraft in order to safely transport it within the aircraft's weight restrictions and balance requirements. Once the cargo distribution is calculated, the loadmaster completes

the load plan by determining the sequence of the loading process required to achieve the desired weight distribution. The completed load plan is delivered to the loading crew, and the loadmaster oversees compliance with the plan during the crew's process of organizing the cargo on the ramp and loading it onto the aircraft. The loadmaster is also responsible for ensuring that the load is properly restrained, and for making any corrections to the load plan to accommodate changes in the load. Finally, before the flight can depart, loadmasters must coordinate the preparations of flight-related documents required by the flight crew.

The loadmaster's duties do not end when the cargo is loaded and the flight departs. If a loaded aircraft stops en route to the cargo's ultimate destination, whether or not cargo has been on or offloaded during the stop, a loadmaster inspects the cargo load and restraint systems and corrects any deficiencies or deviations from the load plan that may interfere with the flight's safe operation. When the load reaches it's final airport destination, a loadmaster overseas its safe offloading.

Many Atlas Air flights are assigned to a loadmaster who travels with cargo and performs all of the loadmaster functions related to the flight. In some cities, however, loadmasters remain on the ground, where they perform loadmaster duties for Atlas flights arriving and departing from a particular airport. The essential services provided by a Loadmaster are the same whether the loadmaster is responsible for a particular flight or stationed on the ground at a particular airport.

Plaintiff, Brandon Valdivieso performed loadmaster services for Atlas Air from March 12, 1999 until April 10, 2000. During some of that period, he was

responsible for and traveled with individual flights. At other times, however, he provided load master services only on the ground in Miami, Florida. Plaintiff David Kickzales provided loadmaster services to Atlas Air from approximately August 1 998 until May 2000. Kickzales generally traveled with the loads for which he was responsible. Neither plaintiff performed any services for Atlas Air that were not directly related to its air transportation activities.

CONCLUSIONS OF LAW

The sole issue raised by Defendant's Motion for Summary Judgment is whether loadmasters and ramp-supervisors, such as Brandon Valdivieso and David Kickzales, and the class they purportedly represent, are excepted from the overtime provisions of the FLSA by the "air carrier exemption" of the Act. Generally, Section 207 of the FLSA requires covered employers to pay premium overtime provisions to covered employees who work in excess of forty hours a week. However, the FLSA contains specific exceptions to Section 207's overtime requirements, including an exemption for "any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act." 29 U.S.C. § 217(b)(3).

Title II of the Railway Labor Act ("RLA") governs:

> every common carrier by air engaged in interstate or foreign commerce... and every pilot or other person who performs any work as an employee or subordinate official of such carrier..., subject to its continuing authority to supervise and inspect the manner of rendition of this service.

45 U.S.C. § 181. Federal courts have uniformly applied the FLSA "air carrier" exemption to employees of air carriers whose work "bears more than a tenuous, negligible and remote relationship to the transportation activities" of the air carrier. *See e.g. Northwest Airlines v. Jackson*, 185 F.2d 74, 75 (8th Cir. 1950).

A. Atlas Air is a "Common Carrier" for RLA Purposes

Applying the aircraft carrier exemption here, the court first finds that Atlas Air is a common carrier as envisioned by the Railway Labor Act. As found above, Atlas Air is a commercial air carrier that owns, operates and maintains a fleet of freight aircraft that it leases ("outsources") to other air carriers for the transportation of cargo to over 100 cities worldwide. Atlas Air outsources its aircraft under long-term "ACMI" contracts whereby Atlas Air provides the aircraft, crew, maintenance and insurance for flight operations of its customers. Thus, Atlas Air is a company "that undertakes for hire to transport to place to place the property of others who may choose to employ [Atlas Air]" so that Atlas Air is a common carrier for RLA purposes. *See Washington v. Kuykendall*, 275 U.S. 207, 211 (1927). The fact that Atlas Air performs most of its transportation services under long-term ACMI contracts does not strip it of its common carrier status. *See Las Vegas Hacienda, Inc. v. Civil Aeronautics Bd.*, 298 F.2d at 430 434 (9th Cir. 1962) (holding that "it is immaterial that services offered may be performed pursuant to special contract"); *Woolsev v. National Transportation Safety Bd.*, 993 F.2d 516 (5th Cir. 1993) (holding that airline which operated according to its customer's schedule and desired flight destinations was nevertheless entitled to common carrier status).

Furthermore, Atlas Air's common carrier status is not affected by the specialization of its services to meet the needs of and attract a particular segment of the general public — commercial airlines that focus primarily on passenger services.

As the Supreme Court noted in *Terminal Taxi Cab Co. v. Kutz*, 241 U.S. 252, 254 (1916), "[n]o carrier serves all the public. His customers are limited by the 'place, requirements, ability to pay and other facts."' Further, "[s]o long as the air carrier is competing commercially in the market for the patronage of the general public ... it is immaterial that the service offered will be attractive only to a limited group." *Las Vegas Hacienda*, 298 F.2d at 434.

Moreover, to be a common carrier, Atlas Air is not required to hold itself out to every member of the public. Instead, it may hold itself out to "a definable segment of the public as being willing to transport for hire, indiscriminately." *Woolsey*, 993 F.2d at 523. Here, it is undisputed that Atlas Air is willing to transport air cargo for any customer choosing to employ it. Although Atlas Air primarily solicits and does business with other commercial airlines, Atlas provides that service indiscriminately within that group. Moreover, Atlas solicits other entities that are likely to need air cargo transportation and regularly accepts work from businesses that are not commercial airlines. Thus, Atlas Air meets the "holding out" requirement for common carrier status.

Plaintiffs' argument that Atlas Air is not a common air carrier contradicts both settled law and common sense. Atlas owns and operates a fleet of aircraft that it uses to transport cargo for as many customers as it can attract and serve. Although its primary customers are

other commercial airlines, Atlas Air is willing to and, does, in fact, serve other entities. Finally, Atlas Air is licensed by the United States Department of Transportation as a common carrier, and other courts have found that Atlas Air is subject to the RLA. *See, e.g. Atlas Air Inc. v. Air Line Pilots Ass'n*, 232 F.3d 218 (D.C. Cir. 2000); *Beckett v. Atlas Air. Inc.*, 968 F.Supp. 814 (E.D.N.Y. 1997). Clearly, under the undisputed facts of this case, Atlas Air operates as a common air carrier and is, therefore, exempt from the overtime provisions of the FLSA.

B. The "Air Carrier" Exemption Applies to Plaintiffs

Plaintiffs next attempt to avoid application of the air carrier exemption to their particular positions with Atlas Air by arguing that the scope of the exemption should be limited to pilots who are subject to maximum hours of service limitations by the FAA. However, this argument contradicts the plain language of the statute. The FLSA exempts "any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act." 29 U.S.C. § 213(b)(3) (emphasis added). Moreover, the RLA expressly extends its coverage beyond pilots, subjecting "every pilot or *other person who performs any work as an employee*" to its provisions. 45 U.S.C. § 181 (emphasis added). Clearly, Congress did not intend to limit the RLA or the corresponding air carrier exemption to pilots or it would not have included such additional broad-reaching language.

Federal courts that have analyzed the applicability of the air carrier exemption have done so on the basis of the employee's relationship to the employer's transportation activities, not on the existence of hours-of-work regulations that overlap with the FLSA overtime

provision. *See e.g., Verrett v. The Sabre Group. Inc.*, 70 F.Supp.2d 1277 (N.D. Okla. 1999); *Northwest Airlines v. Jackson*, 185 F.2d 74 (8th Cir. 1950); *Roland v. United Airlines, Inc.*, 75 F.Supp. 25 (N.D. III. 1947).

Here, plaintiffs are loadmasters and/or ramp supervisors who perform services for Atlas Air that "bear more than a tenous [sic], negligible and remote relationship to the transportation activities" of Atlas Air. Plaintiffs, as loadmasters, were responsible for assuring that cargo transported by Atlas Air met the aircraft's parameters for safe flight. Ramp supervisors, as the job title implies, acted in a supervisory capacity overseeing ramp operations.[3] As a result, their work as both loadmasters and ramp supervisors was integral to the transportation activities of Atlas Air, and plaintiffs are properly subject to the air carrier exemption to the overtime provisions of the FLSA.

CONCLUSION

Atlas Air is entitled to summary judgment on plaintiffs' claims for overtime compensation under the FLSA. As plaintiffs' concede, there are no material disputes of fact in this case; and, as the undisputed facts demonstrate, Atlas Air is a common carrier by air subject to the RLA. The undisputed facts also demonstrate that the work performed by plaintiffs as loadmasters and ramp supervisors was intimately related to Atlas Air's transportation activities so that the air carrier exemption applies to them. As a result, plaintiffs are subject to that

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[3] The parties make no distinction between loadmasters and ramp supervisors in discussing the application of the air carrier exemption to this case.

exemption and cannot prevail on their claims for overtime compensation in this case.

Accordingly, the Court hereby GRANTS Defendant's Motion for Summary Judgment as to both counts of the Complaint.

DONE AND ORDERED in Chambers, at Miami, Florida this 21st day of December, 2001.

TED E. BANDSTRA
United States Magistrate Judge

APPENDIX D — DISTRICT COURT CASES, COLLECTED IN *BREUER v. JIM'S CONCRETE OF BREVARD, INC.*, HOLDING THAT CLAIMS BROUGHT PURSUANT TO THE FAIR LABOR STANDARDS ACT OF 1938 ARE REMOVABLE.

1. *Ehle v. Williams & Boshea, L.L.C.*, 2002 U.S. Dist. LEXIS 4142, Slip Copy, 2002 WL 373271 (E.D. La. 2002);

2. *Hesni v. Williams & Boshea, L.L.C.*, 2002 U.S. Dist. LEXIS 4138, Slip Copy, 2002 WL 373273 (E.D. La. 2002);

3. *Shaw v. CF Data Corp.*, 2001 U.S. Dist. LEXIS 16651, Slip Copy, 2001 WL 1326528 (N.D. Tex. 2001);

4. *Roseman v. Best Buy Co., Inc.*, 140 F. Supp. 2d 1332 (S.D. Ga. 2001);

5. *Valdivieso v. Atlas Air, Inc.*, 128 F. Supp. 2d 1371 (S.D. Fla. 2001);

6. *Brown v. Sasser*, 128 F. Supp. 2d 1345 (M.D. Ala. 2000);

7. *Mincy v. Staff Leasing, L.P.*, 100 F. Supp. 2d 1050 (D. Ariz. 2000);

8. *Chapman v. 8th Judicial Juvenile Prob. Bd.*, 22 F. Supp. 2d 583 (E.D. Tex. 1998);

9. *H & R Block, Ltd. v. Housden*, 24 F. Supp. 2d 703 (E.D. Tex. 1998);

10. *Lisai v. Chevron Stations, Inc.*, 1997 U.S. Dist. LEXIS 20841, 1997 WL 694705 (N.D. Tex. 1997);

11. *Barrois v. Hilton Title*, 1996 U.S. Dist. LEXIS 8172, 1996 WL 312063 (E.D. La. 1996);

12. *Brown v. Luk, Inc.*, 1996 U.S. Dist. LEXIS 7173, 1996 WL 280831 (N.D.N.Y. 1996);

13. *Troutt v. Stavola Bros., Inc.*, 1994 U.S. Dist. LEXIS 19819, 1994 WL 773148 (M.D.N.C. 1994);

14. *Loutfy v. R.R. Donnelley & Sons Co.*, 1992 U.S. Dist. LEXIS 6142, 1992 WL 97761 (N.D. Ill. 1992);

15. *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F. Supp. 989 (E.D. Mo. 1991);

16. *Nesbitt v. Bun Basket, Inc.*, 780 F. Supp. 1151 (W.D. Mich. 1991);

17. *Isaac v. Wm. H. Pflaumer & Sons, Inc.*, 1990 U.S. Dist. LEXIS 8892, 1990 WL 102808 (E.D. Pa. 1990);

18. *Fraternal Order of Police, Red Rose Lodge No. 16 by Gainer v. City of Lancaster*, 1989 U.S. Dist. LEXIS 6341, 1989 WL 60440 (E.D. Pa. 1989);

19. *Spieth v. R & B Appliance Parts*, 1989 WL 56486 (D. Ariz. 1989);

20. *Jacobson v. Holiday Travel, Inc.*, 110 F.R.D. 424 (E.D. Wis. 1986);

21. *Ramos v. H.E. Butt Grocery Co.*, 632 F. Supp. 342 (S.D. Tex. 1986);

22. *Taylor v. Brown*, 461 F. Supp. 559 (E.D. Tenn. 1978);

23. *Barrett v. McDonald's of Okla. City*, 419 F. Supp. 792 (W.D. Okla. 1976);

24. *Anthony v. West Coast Drug Co.*, 331 F. Supp. 1279 (W.D. Wash. 1971);

25. *Hill v. Moss-Am., Inc.*, 309 F. Supp. 1175 (N.D. Miss. 1970);

26. *Goettel v. Glenn Berry Mfrs., Inc.*, 236 F. Supp. 884 (N.D. Okla. 1964);

27. *Niswander v. Paul Hardeman, Inc.*, 223 F. Supp. 74 (E.D. Ark. 1963);

28. *Buckles v. Morristown Kayo Co.*, 132 F. Supp. 555 (E.D. Tenn. 1955);

29. *Rossi v. Singer Sewing Mach. Co.*, 127 F. Supp. 53 (D. Conn. 1953); and

30. *Swettman v. Remington Rand, Inc.*, 65 F. Supp. 940 (S.D. Ill. 1946).

APPENDIX E — DISTRICT COURT CASES, COLLECTED IN *BREUER v. JIM'S CONCRETE OF BREVARD, INC.*, HOLDING THAT CLAIMS BROUGHT PURSUANT TO THE FAIR LABOR STANDARDS ACT OF 1938 ARE NOT REMOVABLE.

1. *Lopez v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 865 (S.D. Tex. 2000);

2. *Esquivel v. St. Andrews Constr.*, 999 F. Supp. 863 (N.D. Tex. 1998);

3. *Pauly v. Eagle Point Software Co.*, Inc., 958 F. Supp. 437 (N.D. Iowa 1997);

4. *Courtwright v. Bd. of Regents of Cent. Mo. State Univ.*, 1991 U.S. Dist. LEXIS 17238, 1991 WL 255594 (W.D. Mo. 1991);

5. *Bintrim v. Bruce-Merilees Elec. Co.*, 520 F. Supp. 1026 (W.D. Pa. 1981);

6. *Haun v. Retail Credit Co.*, 420 F. Supp. 859 (W.D. Pa. 1976);

7. *Carter v. Hill & Hill Truck Line, Inc.*, 259 F. Supp. 429 (S.D. Tex. 1966);

8. *Wilkins v. Renault Southwest, Inc.*, 227 F. Supp. 647 (N.D. Tex. 1964);

9. *Zorilla v. Puerto Rican Cement Co.*, 227 F. Supp. 159 (D.P.R. 1964);

10. *Rolon v. Flexicore Co.*, 216 F. Supp. 954 (D.P.R. 1963);

11. *Dando v. Stonhard Co.*, 93 F. Supp. 270 (W.D. Mo. 1950); and

12. *Maloy v. Friedman*, 80 F. Supp. 290 (N.D. Ohio 1948).

No. 02-728

DEC 20 2002

IN THE

Supreme Court of the United States

BRANDON VALDIVIESO and DAVID KICKZALES,
on behalf of themselves and all others similarly situated,

Petitioners,

v.

ATLAS AIR, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented for review by the Court are more appropriately stated as the following:

1. Should the Supreme Court grant certiorari to review the Eleventh Circuit Court of Appeals' determination that a claim brought under the Fair Labor Standards Act in state court can be removed to federal district court?

2. Should the Supreme Court grant certiorari to review the Eleventh Circuit Court of Appeals' determination that the air carrier exemption to the Fair Labor Standards Act applies to the Petitioners, whose positions were integrally related to the transportation activities of an air carrier?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Atlas Air, Inc., is a wholly owned subsidiary of Atlas Air World Wide Holdings, Inc.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete. Accordingly, Respondent sets forth a more complete statement of the undisputed facts relevant to the petition.

Atlas Air, Inc.

Atlas Air, Inc. ("Atlas Air" or the "Company") is a common carrier by air that owns, operates, and maintains a fleet of Boeing 747 freighter aircraft that it uses to transport cargo to over 100 cities worldwide. (Petitioner's Appendix ("Pet. App."), pp. 3a – 7a). The Company specializes in long-term outsourcing of its aircraft under "Aircraft, Crew, Maintenance, and Insurance" ("ACMI") contracts. (Pet. App., p. 3a). Atlas provides the ACMI for the flights it operates on behalf of its customers, while its customers bear all other operating expenses, including fuel, landing fees, and cargo and ground handling. (Pet. App., p. 3a).

Atlas Air provides its services primarily to other major international airlines and does so indiscriminately. (Pet. App., p. 3a). Each customer airline contracts with Atlas for one or more dedicated aircraft, allowing those airlines to expand their ability to meet their cargo transportation responsibilities without investing in additional equipment and personnel. (Pet. App., p. 4a). The Company solicits other entities that may need cargo transportation and accepts work from businesses that are not commercial airlines. (Pet. App., pp. 3a – 4a).

Atlas Air operates its own aircraft. Its customers provide ground transportation for the cargo shipped by Atlas Air, as well as handling agents who physically load and unload the

cargo. (Pet. App., pp. 3a – 4a). However, Atlas Air supervises the cargo loading process to ensure that all cargo is situated and secured for safe flight. (Pet. App., p. 4a).

Loadmaster Services

Loadmasters are trained professionals who specialize in air cargo transportation. (Pet. App., pp. 4a – 5a). Their duties are integrally related to Atlas Air's transportation activities. (Pet. App., p. 8a). Loadmasters ensure that each cargo load transported by the Company complies with the specific size and weight parameters for each aircraft and flight, that the load's distribution on the aircraft meets the aircraft's balance requirements, and that any hazardous materials are packaged and transported in compliance with all applicable regulations. (Pet. App., pp. 4a – 5a). The essential services provided by a loadmaster are the same whether the loadmaster is assigned to a specific flight or stationed on the ground at a particular airport. (Pet. App., p. 5a).

Petitioners' Services for Atlas Air[1]

Petitioner Brandon Valdivieso performed loadmaster services for Atlas Air from March 12, 1999 until April 10, 2000. (Pet. App., p. 5a). At times she was responsible for and traveled with individual flights. (Pet. App., p. 5a).

1. Atlas Air contends that Petitioners were independent contractors, not employees of Atlas Air. However, because the Company asserts that, even if they were employees, Petitioners would be subject to the air carrier exemption to the FLSA's overtime provisions, it has not yet raised the independent contractor issue with the district court, and the issue is not presently before this Court. Should this case be remanded to the district court, however, Atlas Air reserves the right to establish Petitioners' independent contractor status.

At other times, however, she provided loadmaster services only on the ground at the Miami, Florida airport. (Pet. App., p. 5a).

Petitioner David Kickzales provided loadmaster services to the Company from approximately August 1998 until May 2000. (Pet. App., p. 5a). He generally traveled with the loads for which he was responsible. (Pet. App., p. 5a). Neither Petitioner performed any services for Atlas Air that were not directly related to the Company's air transportation activities. (Pet. App., p. 5a).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decision Permitting Removal of an FLSA Claim does not Present Issues Warranting Certiorari.

Under 28 U.S.C. § 1441, federal claims brought in state court are generally removable. That section provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (2000). Section 216(b) of the Fair Labor Standards Act ("FLSA" or the "Act") provides that an action to recover under the Act "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b) (2000). Petitioners assert that the phrase "may be

maintained" provides the express prohibition required by 28 U.S.C. § 1441 to prohibit removal of FLSA claims. The Eleventh Circuit rejected that assertion, affirming the district court's denial of the Petitioners' motion to remand the case to the state court in which it was originally filed. (Pet. App., pp. 5a – 6a).

Petitioners assert two arguments in support of reviewing the Eleventh Circuit's decision regarding the removability of FLSA claims: 1) the decision purportedly conflicts with the Eighth Circuit's opinion in *Johnson v. Butler Bros., Inc.*, 162 F.2d 87 (8th Cir. 1947); and 2) the decision purportedly contradicts congressional intent to disallow removal. Neither of those arguments, however, presents the kind of compelling reason required by Rule 10 of the Supreme Court Rules to grant a writ of certiorari.

A. There is No Real Split Among the United States Circuit Courts Regarding the Removability of FLSA Claims.

The Eighth Circuit's decision in *Johnson* does not create a conflict among the circuits because it has been superceded by statutory amendment and is easily reconciled with the Eleventh Circuit's decision in this case allowing removal. In 1947, in that purportedly conflicting opinion on whether FLSA claims may be removed to federal district court, the Eighth Circuit wrestled with the "may be maintained" language of Section 216 of the FLSA. *Johnson v. Butler Bros., Inc.*, 162 F.2d at 88-90. The court noted that the removal statute, as it existed in 1947, authorized "the removal of a 'suit of a civil nature . . . arising under the . . . laws of the United States . . . , of which the district courts of the United States are given original jurisdiction. . . .'" *Id.* Recognizing

that the district courts have original jurisdiction over an action under the FLSA, the court framed the question as whether the phrase "may be maintained" expresses congressional intent that an action, if brought in a state court, must remain there through final judgment. *Id.*

The Eighth Circuit concluded that the phrase is ambiguous, noting:

> This question as to the intent of Congress has given the federal district courts much difficulty. The result is that in some districts cases such as this may be removed and in other districts they may not be removed. For this unfortunate situation the courts are not to blame. It is attributable to *the failure of Congress clearly and accurately to express its intent.*

Id. at 89 (emphasis added). Ultimately, the court resolved that ambiguity in favor of disallowing removal. *Id.* at 89 – 90.

The following year, however, Congress clarified its intent regarding removal provisions in general, creating a presumption in favor of removal that the ambiguous language of Section 216 is insufficient to overcome. In 1948, Congress amended the general removal statute to provide that civil actions may be removed "[e]xcept as otherwise *expressly provided* by Act of Congress." 28 U.S.C. § 1441(a) (2000) (emphasis added). As the Eighth Circuit held in *Johnson*, the FLSA does not "clearly and accurately . . . express" an exception to removability. *Johnson*, 162 F.2d at 89. Thus, the 1948 amendment disallowed *Johnson* – style interpretations of ambiguous removal language and superceded the Eighth Circuit's decision in *Johnson*.

The other circuits that have considered this issue agree that the 1948 amendment precludes the result reached by the Eighth Circuit in *Johnson*. *See Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986); *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002). Since 1948, even district courts within the Eighth Circuit have recognized that *Johnson* is no longer binding authority, holding that FLSA claims brought in state court can be removed. *See Niswander v. Paul Hardeman, Inc.*, 223 F. Supp. 74 (E.D. Ark. 1963); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F. Supp. 989 (E.D. Mo. 1991). Accordingly, *Johnson* does not create a true, current conflict among the circuits on the issue of whether FLSA claims may be removed.

Petitioners concede that *Johnson* is the only circuit level decision at odds with the Eleventh Circuit opinion on the removal issue. Since the 1948 amendment, every circuit court that has expressed a view on whether Section 216 of the FLSA prohibits removal has concluded that it does not. Both the First and Eleventh Circuits have squarely held that FLSA claims are removable. *See Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986); *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002). Likewise, the Fifth Circuit and the Ninth Circuit have suggested that they will uphold removal of an FLSA claim when presented with the issue. *See Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460 (5th Cir. 1982) (holding that ADEA claims, which are enforced in accordance with Section 216 of the FLSA, are removable and recognizing the impact of the 1948 amendment on the removal issue); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1988) (noting in dicta that the FLSA contains "no limitation on removal, express or otherwise"). Thus, all of the known post-amendment

decisions by the circuit courts concerning the removability of FLSA claims are in agreement, and there is no split among the circuits warranting this Court's review. Likewise, as Petitioners concede, a developing majority of the federal district courts have held that FLSA claims are removable. Any remaining disagreement among the district courts is more expeditiously handled at the circuit court level.

B. The Eleventh Circuit's Decision Regarding Removal of FLSA Claims is not Contrary to Congressional Intent.

Petitioners argue that this Court should review the Eleventh Circuit's decision because legislative history demonstrates that the FLSA was intended to prohibit removal of claims that are initiated in state court. However, Petitioners have cited no legislative history showing that Congress ever discussed the issue of removability of FLSA claims when passing the law. Rather, they rely on the legislature's editing of an earlier draft of the Act, replacing language granting state and federal courts concurrent jurisdiction over FLSA claims with the present, more concise language permitting maintenance of an FLSA claim in any court of competent jurisdiction. However, replacing the concurrent jurisdiction clause with the term "maintain" hardly amounts to the clear expression of congressional intent required to prohibit removal. Although one possible definition of the term "maintain" is "to continue," another, equally valid definition is "to assert." *See Black's Law Dictionary* 964 (7th ed. 1999) (defining "maintain" as "to continue (something)" or "to assert (a position or opinion)").[2]

2. Petitioners' reliance on *Maloy v. Friedman*, 80 F. Supp. 290 (N.D. Ohio 1948), for the proposition that this Court interpreted (Cont'd)

Moreover, as this Court has recently noted, the best evidence of congressional intent is the plain language of the text itself. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 895 (2000). The plain language of the general removal statute specifically states that any exception to removal must be "expressly provided by Act of Congress." 28 U.S.C. § 1441(a) (2000). As the First Circuit has emphasized:

> Section 1441(a) explicitly states that an express provision by Act of Congress is required to preclude the right to removal. We think the words "expressly provided" must be construed to mean exactly that.

Cosme Nieves, 787 F.2d at 451.

The FLSA simply does not meet that unambiguous requirement. Again, the language of Section 216 of the FLSA allowing an action to be maintained in any court of competent

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(Cont'd)
"maintain" to mean "continue" before the FLSA was passed is unpersuasive. One of the cases cited by the *Maloy* court in support of that proposition is *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373 (1933). As another court has noted:

> The Court in [*Rose*] dealt with the word "maintain" in a wholly different context, and only found that maintain "mean[s] no less than to prosecute with effect." Thus, though the Court found that "maintain" meant, at the very least, "to prosecute with effect" nowhere did it say that it could only mean "continue," or that it could not have other meanings, such as "assert."

Roseman v. Best Buy Co., 140 F. Supp. 2d 1332, 1338 n.10 (S.D. Ga. 2001).

jurisdiction is ambiguous and does not create an express exception to the removal statute. Likewise, even if the legislative history of the FLSA could be interpreted as an unambiguous expression of congressional intent to disallow removal, it does not amount to an "Act of Congress," as required by Section 1441(a).

Finally, Petitioners argue that allowing removal of FLSA claims violates the congressional goal of making such actions easier for employees to prosecute. However, by enacting Section 1441(a), Congress clearly expressed a different policy – one of allowing defendants to remove federal claims to federal courts. When Congress has chosen to abandon this policy in favor of a competing policy, such as the one Petitioners assert here, it has done so in clear and unambiguous terms. Such express prohibitions against removal are readily found in other statutes. For example, in 28 U.S.C. § 1445, Congress listed certain federal claims that may not be removed.[3] However, Congress did not see fit to

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3. 28 U.S.C. § 1445 (2000) provides:

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under section 1 – 4 and 5 – 10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), *may not be removed* to any district court of the United States.
>
> (b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, *may not be removed* to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(Cont'd)

include FLSA claims in that list. Similarly, the Securities Act of 1993, 15 U.S.C. § 77v(a), expressly prohibits removal to federal court. Thus, if Congress's overriding goal was to allow plaintiffs to have complete control over where FLSA claims are litigated, it would have created a removal exception for those claims in clear and unambiguous language, as it has done for other types of claims. Congress has not acted to create a clear expression of such an intention in the more than five decades since adopting Section 216. Thus, allowing removal of FLSA claims brought in state court does not contradict any real expression of congressional intent, and the Eleventh Circuit's decision permitting removal of an FLSA claim does not present the necessary compelling reasons for this Court's review.

II. The Eleventh Circuit's Decision Holding Petitioners Subject to the Air Carrier Exemption to the Overtime Provisions of the FLSA does not Warrant Review by This Court.

Section 207 of the FLSA requires covered employers to pay overtime premium compensation to covered employees who work in excess of forty hours in a work week. The FLSA also contains specific exemptions to the Section 207 overtime requirements, including an exemption, commonly referred to as the air carrier exemption, for "any employee of a carrier by

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(Cont'd)

> (c) A civil action in any State court arising under the workmen's compensation laws of such State *may not be removed* to any district court of the United States.
>
> (d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 *may not be removed* to any district court of the United States.

(emphasis added).

air subject to the provisions of title II of the Railway Labor Act." 29 U.S.C. § 213(b)(3) (2000). Title II of the Railway Labor Act ("RLA") governs:

> [E]very common carrier by air engaged in interstate or foreign commerce . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 181 (1994).

The Eleventh Circuit found that Atlas Air is a common carrier by air and that the air carrier exemption applied to the Petitioners because they "do not dispute that their positions as loadmasters are integral to the transportation of cargo." (Pet. App., p. 8a). Petitioners argue that, contrary to the unambiguous language of the statute, the exemption should apply only to pilots, and they urge this Court to review the Eleventh Circuit's decision based on one senator's vague reference to the exemption in the legislative history. That reference, however, does not present a compelling reason to grant a writ of certiorari on this issue.

A. The Eleventh Circuit's Holding is Consistent with Every Federal Court Decision on this Issue.

In the more than sixty years since the air carrier exemption was enacted, no federal court has given credence to Petitioners' argument that the exemption should apply only to pilots. Courts have consistently held that title II of the RLA, and the corresponding air carrier exemption, apply broadly to a carrier's workforce, so long as the employee's

activities bear "more than a tenuous, negligible and remote relationship to the transportation activities." *Northwest Airlines v. Jackson*, 185 F.2d 74, 77 (8th Cir. 1950). Indeed, like the Eleventh Circuit in this case, every other federal court that has analyzed the applicability of the air carrier exemption has done so on the basis of the employee's relationship to the employer's transportation activities. *See Verrett v. The Sabre Group, Inc.*, 70 F. Supp. 2d 1277 (N.D. Okla. 1999) (holding that employees of service that provided customized information management and computer reservations for airlines were subject to the air carrier exemption because their functions were integrally related to air transportation); *Slavens v. Scenic Aviation, Inc.*, No. 99-4197, 2000 WL 985933 (10th Cir. Jul. 18, 2000) (unpublished opinion) (holding that medical supervisor of air ambulance company was subject to the air carrier exemption because he supported transportation activities); *Pan Am. World Airways, Inc. v. United Bhd of Carpenters & Joiners*, 324 F.2d 217 (9th Cir. 1963) (holding that house keepers at a nuclear test site were not subject to the exemption because their work was not sufficiently related to transportation activities); *Marshall v. Pan Am. World Airways, Inc.*, No. 75-394-ORL-CIV, 1977 WL 1772 (M.D. Fla. Aug. 8, 1977) (holding that the issue in determining whether employees are subject to the air carrier exemption is their relationship to their employer's transportation activities); *Northwest Airlines v. Jackson*, 185 F.2d 74 (8th Cir. 1950) (same); *Roland v. United Airlines, Inc.*, 75 F. Supp. 25 (D. Ill. 1947) (same).

Thus, every federal court that has considered this issue in the more than sixty years since the inception of the air carrier exemption has agreed that the exemption applies to employees whose work relates to transportation activities. Clearly, the Eleventh Circuit's decision in conformity with that long, consistent line of holdings does not raise unique or compelling issues warranting this Court's time and resources.

B. The Eleventh Circuit Correctly Interpreted the Plain, Unambiguous Language of the Statute.

Petitioners argue that the air carrier exemption's legislative history justifies a scheme of statutory interpretation that is inconsistent with the exemption's plain meaning and every reasoned decision on this issue. The Eleventh Circuit rejected that argument, holding that "Courts cannot . . . consider legislative history when the statutory language is unambiguous." (Pet. App., p. 8a). That holding was undeniably correct.

The language of the air carrier exemption is clear and unambiguous. The FLSA exempts "*any employee* of a carrier by air subject to the provisions of title II of the Railway Labor Act." 29 U.S.C. § 213(b)(3) (2000) (emphasis added). Moreover, the RLA expressly extends its coverage beyond pilots, subjecting "every air pilot *or other person who performs any work as an employee*" to its provisions. 45 U.S.C. § 181 (1994) (emphasis added). Clearly, Congress did not intend to limit the RLA or the corresponding air carrier exemption to pilots. To the contrary, the unambiguous language reveals that both the Railway Labor Act and the air carrier exemption to the FLSA cover many other types of employees.

As this Court has emphasized:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992) (*quoting Rubin v. United States*, 449 U.S. 424, 430 (1981).

Likewise,

> Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 457 (2002). Thus, the Eleventh Circuit properly ended its inquiry upon determining that, under the statute's plain language, the Petitioners are subject to the air carrier exemption.

Petitioners object to the Eleventh Circuit's "plain language" analysis, citing authority for the proposition that courts must look at what words meant when Congress originally used them, not at what that language means in modern times. That rule of judicial interpretation, however, is inapplicable here. Petitioners do not argue that the language of the air carrier exemption was subject to a different meaning when it was enacted. Nor do they argue that the plain language of the exemption has a narrower meaning when interpreted within its original context. Instead, they argue that, in drafting an exemption that applies to "every air pilot or other person who performs any work as an employee," Congress actually meant to limit the exemption to pilots and no one else. No rule of judicial interpretation allows a court to find that Congress meant to do the exact opposite of what it has plainly legislated.

Furthermore, the legislative history cited by the Petitioners does not support their argument that Congress intended the air carrier exemption to apply only to employees whose hours are otherwise regulated. Senator Black's

comments relate to all of the various FLSA exemptions for employees in transportation industries. While those observations demonstrate that Congress wanted to avoid duplicative regulation of transportation employees, they do not in any way support Petitioners' assertion that such desire was Congress's *only* motivation in passing the transportation exemptions. Indeed, the Department of Labor's explanation for those exemptions cited by Petitioners demonstrates that the exemptions were added to the FLSA because of testimony by labor organizations representing transportation workers regarding "the peculiar needs of their industry" as well as the existence of other governmental regulation. (*See* Petitioners' brief, p. 17 n.19). Clearly, Congress was concerned about more than duplicative regulation when it passed the transportation exemptions.

Moreover, the transportation exemptions to which Petitioners analogize the air carrier exemption demonstrate that those exemptions, including the exemption for air carriers, were never intended to apply only to employees whose hours are otherwise regulated. This Court has recognized that the motor carrier exemption applies to employees of motor carriers even if their hours are not subject to other limitations. *See Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943) (applying motor carrier exemption to employees whose hours were not regulated by the Secretary of Transportation); *Levinson v. Spector Motor Serv.*, 330 U.S. 649 (1947) (holding that the issue in determining whether employees are subject to the motor carrier exemption is not whether their hours are otherwise regulated). Likewise, the railway exemption applies to every employee of a rail carrier, even those employees whose hours are not otherwise regulated. *See McComb v. Union Stock Yards & Transit Co.*, 168 F.2d 375 (7th Cir. 1948) (holding stockyard watchmen subject to the railway exemption).

Finally, the air carrier exemption is only one of more than twenty exemptions to the FLSA's overtime requirements. 29 U.S.C. § 213(b) (2000). The majority of those exemptions apply to employees whose hours of service are not otherwise subject to limitation. For example, employees who process maple sap into sugar or syrup, prepare fruits or vegetables for transportation, plant trees, or work in a motion picture theater are exempt from the FLSA's overtime requirements. 29 U.S.C. § 213(b) (2000). The existence of those exemptions contradicts Petitioners' assertion that Congress intended to exempt from the FLSA only those employees whose hours of service are otherwise regulated.

Thus, the Eleventh Circuit's decision in this case correctly interpreted the plain language of the air carrier exemption and is not contrary to congressional intent. As a result, it does not create compelling reasons for review by this Court.

CONCLUSION

This case does not present compelling reasons for review on certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 3 2003
OFFICE OF THE CLERK

No. 02-728

In The

Supreme Court of the United States

BRANDON VALDIVIESO and DAVID KICKZALES, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ATLAS AIR, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Eleventh Circuit's interpretation of the FLSA's jurisdictional provisions raises an important question of federal jurisdiction by eliminating the choice of forum that Congress gave to wage-and-hour plaintiffs.

The reading that respondent and the court of appeals give to the jurisdictional provisions of the Fair

Labor Standards Act of 1938[1] — by simply ignoring the statute's provision that any action brought pursuant to it "may be maintained ... in any Federal or State court of competent jurisdiction" — adversely impacts literally thousands of cases each year, *i.e.*, all of those brought under the FLSA and four similar labor-and-employment statutes.[2] By denying the plaintiff his choice of forum, the court of appeals' approach "radically expand[s] the class of removable cases." *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, ___, 122 S. Ct. 1889, 1894 (2002) (federal-law counterclaim cannot be the basis for removal jurisdiction). Such an approach flies in the face of both Congress' expression of intent and this Court's strict construction of statutes concerning the expansion of federal jurisdiction.

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

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[1] 29 U.S.C. § 201, *et seq.*

[2] The Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, adopts the enforcement mechanism of the FLSA, *see* 29 U.S.C. § 626(b), and the Equal Pay Act, 29 U.S.C. § 206(d)is codified and the as part of the FLSA. The Employee Polygraph Protection Act, 29 U.S.C. § 2001, *et seq.*, and the Family Medical Leave Act, 29 U.S.C. 2601, *et seq.*, each states, as does the FLSA, that an action pursuant to those statutes "may be maintained ... in any Federal or State court of competent jurisdiction." *See* 29 U.S.C. §§ 216(b) (FLSA), 2005(c)(2) (EPPA) and 2617(a)(2) (FMLA).

Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 377 (1994) (citations omitted). "[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941).

Respondent contends that Congress superceded *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947) with the 1948 amendment to the removal statute that permitted removal of any federal-question case "[e]xcept as otherwise expressly provided..."[3] 28 U.S.C. § 1441(a). *Johnson*, however, essentially holds that the "may be maintained" language is an express prohibition. *Johnson* reflected the majority rule at the time, based on the 19 district court cases it cited as denying removability compared to the nine it cited as permitting it. 162 F.2d at 89, n. 3. Although the *Johnson* court mildly criticized the language that Congress had chosen, it found that there was no doubt that the phrase "may be maintained" could mean anything other than that FLSA cases could not be removed.[4] 162 F.2d at 89. Otherwise, the *Johnson* court

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[3]The arguments of respondent, Atlas Air., Inc., largely mirror those of the respondent in *Breuer v. Jim's Concrete of Brevard Co., Inc.*, No. 02-337, which involves the same issues as in Question Presented No. 1 in the case at bar. The petitioner in *Breuer* does not appear from the electronic docket to have filed a reply brief. Petitioners, therefore, here address the issues raised in both briefs in opposition.

[4]While various dictionaries contain various meanings of "maintain," — *see* Brief in Opposition, at 7 (two definitions); Brief in Opposition in *Breuer*, at 5-6 (six definitions) — none of those definitions is inconsistent with keeping a state-court FLSA action in state court; all, however, are inconsistent with a removal process that allows defendants to pull wage-and-hour suits out of state court immediately upon their being filed — and requires that they do so, if

(continued...)

reasoned, "may be maintained" would be surplusage — which, as a matter of statutory construction, would be impermissible.[5] Likewise impermissible is the other construction that respondent urges without specifically saying so: that the 1948 amendment to § 1441(a) repealed the jurisdictional provision of the FLSA by implication.[6]

The conclusion that "may be maintained" means "cannot be removed" is further propelled by an analysis of the various statutes that are specified at 28 U.S.C. § 1445 ("Nonremovable actions"). None of them contain any language similar to the FLSA; each of them, therefore, requires the express prohibition of § 1445. Additionally, a 1958 Senate committee report listed the FLSA as being among those actions that always had been intended to be non-removable.[7]

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[4](...continued)
they plan to, within 30 days. *See* 28 U.S.C. § 1446(b).

[5]*See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

[6]*See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808-809 (1976).

[7]The report stated that Congress always had intended FLSA actions brought in state courts to be non-removable.

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmens' compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employer's Liability Act, all of which are in the nature of workmens' compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. *If filed in the State courts the law prohibits removal to the Federal Court.*

S. Rep. No. 1830, 85th Cong., 2d Sess. 9 (1958), *reprinted in* 1958
(continued...)

Although respondent attempts to portray the conflict between the circuits as a stale one, and *Johnson* as having been superceded 54 years ago, that is incorrect.[8] *Johnson* has been followed by a district court in the Fifth Circuit as recently as July 2002,[9] was followed by district courts in Florida in 1997 and 2000[10] prior to *Breuer v.*

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[7](...continued)
U.S.C.C.A.N. 3099, 3106 (emphasis added).

While subsequent legislative history is not dispositive, it is useful in illumining congressional intent. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, (1982) (citing such history as additional support for the conclusion that Congress intended the 180 days within which a Title VII claimant must file a Charge of Discrimination with the Equal Employment Opportunity Commission to operate as a statute of limitations instead of a jurisdictional requirement).

[8]Respondent cites to two Eighth Circuit district-court decisions that did not follow *Johnson* as illustrating that it no longer is good law there. While the court in *Niswander v. Paul Hardeman, Inc.*, 223 F.Supp. 74 (E.D. Ark. 1963) did reason that the 1948 amendment to § 1441(a) made *Johnson* no long applicable, the seven-sentence discussion of the motion to remand in *Waldermeyer v. ITT Consumer Financial Corp.*, 767 F. Supp. 989, 991 (E.D. Mo. 1991) quotes § 1441(a) but neither discusses nor distinguishes *Johnson*. That same year, however, another district court in Missouri held that *Johnson* was still binding in the Eighth Circuit. *Courtwright v. The Board of Regents of Central Missouri State University*, Slip Copy No. 91-0846-CV-W-3, 1991 U.S. Dist. LEXIS 17238, 1991 WL 255594 (W.D.Mo. Nov. 22, 1991).

[9]*See Castillo v. Texans Can!*, Slip Copy, No. CIV.A.3:02-CV-0587-R, 2002 U.S.Dist. LEXIS 13555, 2002 WL 1733727 (N.D. Tex. July 25, 2002)

[10]*See Maranto v. Jenne*, Slip Copy No. 00-7463-Civ-Dimitrouleas (S.D. Fla. Nov. 29, 2000) (remanding Equal Pay Act claim on authority of *Johnson*); *LeMay v. Budget Rent A Car*
(continued...)

Jim's Concrete of Brevard, Inc., 292 F.3d 1308, 1309 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3159 (U.S. Sept. 3, 2002) (No. 02-337), and in 1997 by a district court in the Eighth Circuit that characterized it as still binding.[11] Another district court in Texas earlier this year relied on *Johnson* to hold that a claim brought pursuant to the FMLA could not be removed.[12] The controversy, thus, is not stale: it is still brewing and remains unresolved in all but three circuits — two for removability and one against.[13] Worse yet, the conflict is likely to remain unresolved at the circuit level because of the impossibility of appealing remand orders, *see* 28 U.S.C. § 1447(d), and the logistical difficulties of appealing interlocutory orders denying remand. Thousands of litigants each year, who might otherwise file their wage-and-hour, equal-pay, age-discrimination, family-and-medical-leave and polygraph-abuse claims in state court will find themselves deprived of a choice of forum — contrary both to the intention of Congress and to the "long-standing polic[y]" that makes a plaintiff the "master

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[10](...continued)
Systems, Inc., 993 F.Supp. 1448, 1450, n. 3 (M.D. Fla. 1997) (remanding ADEA claim on strength of *Johnson*.

[11]*Pauly v. Eagle Point Software Co.*, 958 F. Supp. 437, 439 (N.D. Ia. 1997) ("Given the split of authority, this Court cannot conclude that there has been a clear and unequivocal statutory override of the *Johnson* case which would allow the undersigned to disregard clear precedent from the Eighth Circuit Court of Appeals.")

[12]*See Lloyd v. Classic Chevrolet, Inc.*, Slip Copy No. CIV 4:01-CV-896-Y, 2002 U.S. Dist. LEXIS 1604, 2002 WL 989470 (N.D. Tex. Jan. 31, 2002) (granting motion to remand claim brought pursuant to FMLA because of the *Johnson* interpretation of "may be maintained").

[13]*Compare Johnson* (against removal) and *Breuer* and *Cosme Nieves v. Deshler*, 786 F.2d 445, 451. (1st Cir.), *cert denied*, 479 U.S. 824 (1986) (for removal).

of his complaint." *Holmes Group, Inc.*, 535 U.S. at ___, 122 S. Ct. at 1894.

The importance of this issue, as well as the currency of the controversy, requires resolution through a grant of certiorari.

Respondent's authorities demonstrate that the various overtime exemptions for carriers (motor carriers, shipping lines and air carriers) were intended to prevent double-regulation — and not to permit those industries to operate with no regulation of maximum hours.

While respondent asserts that "the transportation exemptions to which Petitioners analogize the air carrier exemption demonstrates that those exemption, including the exemption for air carriers, were never intended to apply only to employees whose hours are otherwise regulated,"[14] the authorities upon which respondent relies show clearly that precisely the opposite is true. Indeed, the Court in *Levenson v. Spector Motor Service*, 330 U.S. 649 (1947), one of the two cases that respondent cites for this proposition, explained the rationale for imposing maximum-hour limitations in the context of "[t]he history of the development of the congressional safety program in interstate commerce, up to and including the enactment of the Motor Carrier Act in 1935 and the Fair Labor Standards Act in 1938...." 330 U.S. at 657. The *Levenson* Court found that as part of "[the] logic of the situation," Congress had "prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service." *Id.* at 661. Thus, any expansion of the

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[14]Brief in Opposition, at 15.

maximum-hour authority of one necessarily results in a contraction, "to a corresponding degree," of the power of the other. *Id.* at 659, 684. In *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943), the other case upon which respondent relies, the Court eschewed "the literal reading of the exception section of the Fair Labor Standards Act..." that respondent urges. Instead, the Court noted the necessity of construing the FLSA and the Motor Carrier Act together "in the light of the purposes which led to the enactment of the entire legislation." 319 U.S. at 47. The Court, looking at the FLSA's legislative history, observed that — as Petitioners argue — "[t]he amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers." *Id.* at 48-49. Although respondent urges the Court to disregard the remarks of the primary sponsor of the FLSA, Senator (and later Justice) Hugo Black, the *Southland* Court (of which Justice Black was a member) stated as part of its rationale that "[f]urthermore, it was said on the Senate floor that the amendment as to motor vehicle operators was to give them the exemption from the Fair Labor Standards Act enjoyed by the railway employers under the Hours of Service Acts." *Id.* at 49.

Respondent points to no source of maximum-hour regulation for any air carrier employees other than pilots, nor even of any unexercised authority for such regulation. It argues, instead that Congress intended all segments of the air carrier industry to operate with no such regulation. While respondent does cite a number of district court and trial court cases that have interpreted the air-carrier exemption expansively,[15] none of those cases either examined the legislative history of the amendment creating the exemption or analyzed it as this Court did in, *inter alia, Levinson* and *Southland Gasoline Co.* Thus,

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[15]Brief in Opposition, at 11-12.

respondent's authorities demonstrate, if anything, the importance of this Court's granting certiorari on this question and conforming the interpretation of the air-carrier exemption to this Court's earlier interpretation of the motor-carrier exemption.

Respectfully submitted,

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